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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1396

STEVENS INDUSTRIES, INC.,
Petitioner,

versus

MARYLAND CASUALTY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Questions presented	1
Statement	2
Argument	4
I. The lower courts have not applied a definition of the term "accident" in any way inconsistent with Georgia cases or any other case	4
II. The facts surrounding the claims were sufficiently developed to enable the lower courts to enter the declaratory judgment	9
Conclusion	11

Cases Cited.

Aerial Agricultural Service of Montana, Inc. v. Till, 207 F. Supp. 50 (D. C. N. D. Miss. 1902)	7
Economy Mills of Elwell, Inc. v. Motorists Mutual Insurance Co., 8 Mich. App. 451, 154 N. W. 2d 659	7-8
E. H. Hardison Seed Co. v. Continental Cas. Co., ... Tenn. App. ..., 410 S. W. 2d 729 (1967)	8
Green v. Aetna Insurance Co., 349 F. 2d 919 (5th Circuit 1965)	9
Hoosier Casualty Co. of Indianapolis v. Fox, 102 F. Supp. 214	10
St. Paul Fire & Marine Insurance Co. v. Northern Grain Co., 365 F. 2d 361 (8th Cir.)	6
St. Paul Mercury Ins. Co. v. Sugarland Industries, Inc., 406 S. W. 2d 778 (Tex. Civ. App. 1966)	8
Western Casualty and Surety Co. v. Beverforden, 93 F. 2d 166, 168 (8th Cir. 1937)	10

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OPINIONS BELOW.

The opinion of the District Court has been reported at 279 F. Supp. 681, and the opinion of the Court of Appeals for the Fifth Circuit is now reported at 391 Fed. 2d 411.

QUESTIONS PRESENTED.

(1) Whether the lower courts erred in holding that the mere failure of peanut seed to germinate and produce in expected quantities did **not** constitute an "accident" within the meaning of the comprehensive liability policy attached to the complaint (R. 8-37), the material portions of which appear as appendix "c" to the petition for certiorari.

(2) Whether the lower courts erred in entering a declaratory judgment based upon the facts presented by this record.

STATEMENT.

The respondent does not desire to re-state all of the facts relating to this case, but does refer the Court to the statements of fact contained in the opinions of the District Court and the Court of Appeals appended to petitioner's petition which more accurately reflect the facts of this case.

At page 5 of the petition for certiorari, the petitioner would have it appear that the decision of the Court of Appeals defined the word "accident" in such a way as to require "movement" or "change", "something affirmative—something active". The Court of Appeals simply quoted some of the language of the District Court's opinion which had defined the term "accident" in such a way as to require something "active", something "affirmative". It is clear that the Court of Appeals did not make this the exclusive test of an "accident" in its able opinion. The Court merely said at Petitioner's Appendix B-7, "We agree that this affirmative action test may often be a useful concept in cases of this type".

One other significant fact to remember about the case at hand is that all of the claims for which coverage was urged in the courts below result from the accidental overtreatment of the peanut seed with mercury by the petitioner at its plant in Dawson, Georgia (R. 81-82). This "accident" of overtreating the seed is expressly excluded from coverage by the definition of the products hazard coverage (R. 10).

During the crop year 1965, which term was covered by the policy at issue, the petitioner's total peanut seed sales amounted to $635,154.69 (R. 98) and the premium charged for products hazard coverage of peanut seed was $71.00.

Petitioner settled many claims with the farmers, most of them being settled before the respondent insurer was notified of the claims on July 5, 1965 (R. 84-87).

Based upon the language of the policy, the facts set forth here and in the opinions below and the decided cases in point, the District Court granted respondent's Motion for Summary Judgment and the Court of Appeals affirmed.

ARGUMENT.

Reasons for denying certiorari.

This case involves nothing more than an insurance coverage question which has been decided in accord with the decisions below in several other jurisdictions. There is nothing flagrant or shocking about the way this case was decided. The Court of Appeals simply held that the failure of seed to germinate and produce in expected quantities because of an accidental overtreatment of the seed at the insured's plant was not an "accident" within the meaning of the policy. The decision was reached in both courts below on the basis that the failure of the seed to produce as expected was not an "accident" within itself but was merely the result of the accidental overtreatment of the seed at the insured's plant. This decision does not conflict with any Georgia case and it does not conflict with the Northern Grain case out of the Eighth Circuit.

The petitioner has read meaning into the opinion of the Court of Appeals which is simply not there.

I.

The lower courts have not applied a definition of the term "accident" in any way inconsistent with Georgia cases or any other case.

At pages 6 and 7, the petition for certiorari states that the Court of Appeals treated the farmers claims as "involving merely the unexpected failure of the seeds to germinate". The same complaint was made of the District Court's opinion when this case was before the Court of Appeals. Both the District Court and the Court of

Appeals recognized that some of the seeds "germinated but the plants failed to produce and died". Petition, Appendix B-2. Respondent does not believe that it makes any difference whether the seed failed to germinate or failed to produce since all of the claims and all of the losses result from the accidental overtreatment at petitioner's plant, an "accident" excluded by the language of the policy. Respondent does not understand the doggedly, erroneous assertion made by petitioner that the lower courts misconstrued the facts of this case.

The quoted portion of the opinion of the Court of Appeals which appears as page 7 of the petition, was incorporated in the Court of Appeals' statement of the basis of the District Court's opinion. It was not, as the petitioner would have this Court believe, the rationale of the Court of Appeals' decision. Nowhere, in its opinion, does the Court of Appeals require that an "accident" within the meaning of the liability policy at issue be something "of movement, of change . . . something affirmative—not negative, something active—not passive." That is the language of the district court. The Court of Appeals merely said that the concept of affirmative action was sometimes helpful in cases of this nature. The truth of the matter, however, is that such a test is a good one and that neither under this test nor any other can it be said that the mere failure of a product to produce its desired result, without more, without something affirmative, constitutes a covered "accident".

The true rationale of both decisions below was that the policy requires an accident occurring away from the premises of the insured and that the facts of this case show that the "accident" occurred at the insured's plant and that the failure of the peanut seed to germinate and produce was merely the result of the "accident" at the plant.

It is stated in the petition that the decision below conflicts with decisions of the Courts of Georgia. The truth of the matter is that the Georgia Courts have never passed upon the question of whether the failure of seed to produce in expected quantities constitutes an "accident" within the meaning of a similar accident policy. In the case at hand, however, a district judge and at least one circuit judge, who are well acquainted with Georgia law from having practiced law and having sat on the bench in Georgia for many years, decided there was no coverage.

The petition states at page 8 that the Georgia Courts have never held that action, movement or change are prerequisites of an "accident". A close reading of the opinion of the Court of Appeals shows that that Court does not require movement or change either. The opinion below simply holds that since the failure of the seed to produce was merely the result of an uncovered accident at the insured's plant, there is no coverage by the policy at hand. As we view the case at hand, the Georgia cases cited at page 8 of the petition have no bearing on the question at issue because of the wide variance of the facts and issues in those cases and ours. Certainly the legislated meaning of the word "accident" in Georgia statute law has no bearing on what the parties to this insurance contract intended.

At page 9 of the petition, it is urged that the decision below is in conflict with the case of St. Paul Fire & Marine Insurance Co. v. Northern Grain Co., 365 F. 2d 361 (8th Cir.). A close reading of the Northern Grain case shows there is no such conflict. The Northern Grain case provided coverage for an "occurrence". Our policy covers only an "accident" occurring after the seed have been removed from the insured's premises. The opinion of the Fifth Circuit distinguished the Northern Grain case as follows: "An 'occurrence' is a broader and more encom-

passing term than 'accident'. In our view, there is a clear distinction in the coverage provided by the policy in the Northern Grain case and the policy in the instant case, . . . it is rather clear that the unintentional choice and sale of the wrong type of seed is closer to the concept of accident than are the events in this case which occurred after the seed were purchased and taken from the Stevens plant. It is admitted that the accident in the Stevens plant is not covered. Rather than providing comfort to the (petitioner), the case tends to support the district court's conclusion that there was no accident in this case after the seed left the premises of Stevens, even though there may have been an occurrence." See also the case of Aerial Agricultural Service of Montana, Inc. v. Till, 207 F. Supp. 50 (D. C. N. D. Miss. 1902), a case relied upon by the Court which decided Northern Grain for a detailed discussion of the difference between "accident" and "occurrence" coverage. If petitioner had desired "occurrence" coverage, such coverage was available at an appropriately increased premium.

The truth of the matter is that to adhere to the view advocated by the petitioner would be to convert an accident policy into a guaranty contract, "providing protection by Maryland against any breach of warranty by Stevens that its product would react or produce in a certain manner." Under petitioner's theory, Stevens could warrant that each peanut seed would produce 100 pounds of peanuts and have recourse against Maryland if they produced but 50 pounds. Such a construction of this policy would be contrary to public policy and is especially untenable in this case where the productive qualities of over $600,000.00 worth of seed peanuts would be guaranteed for a premium of only $71.00.

The Michigan Supreme Court granted leave to appeal the other case cited by petitioner, Economy Mills of El-

well, Inc. v. Motorists Mutual Insurance Co., 8 Mich. App. 451, 154 N. W. 2d 659, on February 20, 1968. The other cases cited by petitioner at pages 11-12 of the petition all involve "accidents" occurring **after** the sale of the produce. Most of them were distinguished by the District Court below on the basis that in all of them something happened, i. e., an "accident", after sale of the product. The difference between the case at hand and all of those cases is that in all of those cases some type of "accident" occurred after sale. In this case what happened was merely the result of the accident at petitioner's plant, an "accident" petitioner has admitted is not covered.

The cases directly in point with the case at hand all reach the result which was reached by the two courts below. In St. Paul Mercury Ins. Co. v. Sugarland Industries, Inc., 406 S. W. 2d 778 (Tex. Civ. App. 1966), and E. H. Hardison Seed Co. v. Continental Cas. Co., ... Tenn. App. ..., 410 S. W. 2d 729 (1967), both hold no coverage in cases involving policies identical to the one at hand. The facts in each of those cases are not materially at variance with those of our case. In each, the seed failed to do what they were supposed (or warranted) to do. In both of those cases the Court held no coverage. In truth that is the only tenable result. For to hold otherwise would convert the policy to a guaranty contract under which a seed company can breach its contract with recourse on its "accident" insurer. We do not feel this is a reasonable position to take.

We respectfully submit that a reading of both opinions below, the Hardison and Sugarland cases above and considerations of public policy, not only support the decisions below, but rule out entirely any other result. As the District Court said when this case was first decided:

> "Courts have no more right by strained construction to make an insurance policy more beneficial by ex-

tending the coverage contracted for than they would to increase the amount of the insurance. The insurance here is not simply against the results of any accident, but only against the results of an accident which occurs after possession of the product had been relinquished to others by the insured. If the purchaser's loss is solely the result of the accident which occurred during the processing operation, as we believe it to be, then the policy does not cover the case."

II.

The facts surrounding the claims were sufficiently developed to enable the lower courts to enter the declaratory judgment.

The petitioner urges that the nature of the claims as a result of the accidental overtreatment of the peanut seeds were not sufficiently shown as to come within the "case or controversy" requirement of Article III of the Constitution. In support of this proposition, petitioner relies upon the case of Green v. Aetna Insurance Co., 349 F. 2d 919 (5th Circuit 1965). The Green case merely held that, under the facts of that case and under Texas law, it could not be said that the claimants could not set forth facts which would preclude coverage. We here have, as both courts below held, a different situation. The record in this case, with petitioner's broadly stated counterclaims, its answers to interrogatories, claim notices, claim suits and attachments provide ample evidence of the nature of the claims so as to enable the proper entry of the judgment which was entered. The petitioner apparently felt that entry of a judgment fully declaring the rights of the parties was proper when it filed its motion for Summary Judgment in the District Court (R. 190-192). It will be noted that petitioner at that time had no reservations

about the jurisdiction of the District Court to determine whether respondent was obligated to pay eventual judgments.

This case pended in the District Court over a period of fourteen months as the record was developed. Petitioner has so broadly pled its counter-claim as to cover every conceivable claim which could be made and some which are inconceivable. It is well settled in cases under the Declaratory Judgments Act, that claimants who have not filed suit are not necessary parties. Hoosier Casualty Co. of Indianapolis v. Fox, 102 F. Supp. 214; Western Casualty and Surety Co. v. Beverforden, 93 F. 2d 166, 168 (8th Cir. 1937).

To adhere to petitioner's argument that there is no "case or controversy" in this case would render the Declaratory Judgments Act a nullity. It would be contrary to the intent of the Act as announced numerous times by this Court, i. e., to make the courts more serviceable and to prevent needless litigation. To send this case back to the District Court on this point or to require separate litigation on the question of whether respondent must pay the judgment for each claim would be to require precisely what the Declaratory Judgment Act was designed to alleviate.

All of the claims, according to petitioner's own counterclaims and answers to interrogatories, whether sounding in breach of warranty or negligence, as suggested by petitioner (though we cannot visualize a negligence suit with the greater problems of proof) must, of necessity be based upon the result of the overtreatment by petitioner at its plant. The plain meaning of the policy, both opinions below, and reason and logic, excludes coverage for this "accident" at the plant.

CONCLUSION.

For all of the reasons advanced above, we respectfully request that the writ be denied in this case.

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